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Jaya Jusco Stores Sdn Bhd v Sime Darby Security Services Sdn Bhd & Ors

HIGH COURT (KUALA LUMPUR) — SUIT NO S2-22-67 OF 1995
KAMALANATHAN RATNAM J
18 AUGUST 1999

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Contract *— Bailment — Burden of proof — Acts committed by third party — Whether bailee had to adduce evidence to show that they were not negligent — Contracts Act 1950 ss 104 & 105*

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The plaintiff entered into an agreement with the first defendant for armed guard services, whereby the first defendant agreed to provide a specially designed vehicle and armed escort to collect consignments of cash from the plaintiff's branches to deposit into their account. On 11 May 1987, the second, third and fourth defendants and another were instructed by the first defendant to carry out the transfer of cash at one of the branches of the plaintiff where they were robbed. The plaintiff brought a claim against the defendants for the sum of money robbed claiming that the first defendant was negligent, had breached the agreement with them and that as bailee for reward, the first defendant was liable for losses suffered by the plaintiff. The defendants argued that since the robbery was perpetrated by third parties, they could not be liable.

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Held, allowing the plaintiff's claim against the defendants as bailees:

Under ss 104 and 105 of the Contracts Act 1950, the onus of proof shifts to the bailee to show that it had taken as much care of the plaintiff's goods as a person of ordinary prudence would (see pp 113I–114A). Even if it was the act of the third party that caused the loss, the onus of showing that there was no negligence on its part, still rested with the first defendant and it was incumbent upon them to adduce evidence of exculpation. As the defendants did not give any evidence, the plaintiff succeeded by default of the defendants to rebut the prima facie evidence of negligence that latched onto them, by virtue of the entrustment of the cash, as bailee (see pp 114I–115B); *Port Swettenham Authority v TW Wu & Co (M) Sdn Bhd* [1978] 2 MLJ 137 followed.

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[Bahasa Malaysia summary

Plaintif telah memasuki satu perjanjian dengan defendan pertama bagi perkhidmatan pengawal bersenjata, di mana defendan pertama telah bersetuju untuk mendapatkan satu kenderaan yang direka khas dan kawalan bersenjata untuk mengutip konsainan wang tunai daripada cawangan-cawangan plaintif untuk didepositkan ke dalam akaun mereka. Pada 1 Mei 1987, defendan-defendan kedua, ketiga dan keempat dan seorang lain telah diarahkan oleh defendan pertama

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untuk melaksanakan pemindahan wang tunai tersebut di salah sebuah daripada cawangan plaintif di mana mereka telah dirompak. Plaintif telah memulakan satu tuntutan terhadap defendan-defendan bagi jumlah wang yang dicuri tersebut dengan mendakwa bahawa defendan pertama telah cuai, melanggar perjanjian antara mereka dan bahawa sebagai baili ganjaran, defendan pertama adalah bertanggung-jawab terhadap kerugian yang dialami oleh plaintif. Defendan-defendan telah menghujahkan bahawa memandangkan rompakan tersebut telah dilakukan oleh pihak ketiga, mereka tidak boleh dipertanggungjawabkan.

Diputuskan, membenarkan tuntutan plaintif terhadap defendan-defendan sebagai baili-baili:

Di bawah ss 104 dan 105 Akta Kontrak 1950, beban membukti berpindah kepada baili untuk menunjukkan bahawa ia telah menjaga dengan sebaik-baiknya barangan plaintif sepertimana seseorang yang berhemat biasa akan bertindak (lihat ms 113I–114A). Walaupun tindakan pihak ketiga telah menyebabkan kerugian tersebut, beban untuk menunjukkan bahawa tiada kecuaian di pihaknya masih terletak pada defendan pertama dan ia merupakan kewajipan ke atas mereka untuk mengemukakan keterangan yang akan membebaskan mereka daripada tuduhan tersebut. Memandangkan defendan-defendan tidak memberikan apa-apa keterangan, plaintif telah berjaya dengan kegagalan defendan-defendan untuk mematahkan keterangan prima facie kecuaian tersebut yang telah ditempelkan pada mereka, disebabkan oleh amanah menjaga wang tunai tersebut, sebagai baili (lihat ms 114I–115B); *Port Swettenham Authority v TW Wu & Co (M) Sdn Bhd* [1978] 2 MLJ 137 diikut].

Notes

For cases on bailment generally, see 3 *Mallal's Digest* (4th Ed, 1997 Reissue) paras 1600–1609.

Cases referred to

Port Swettenham Authority v TW Wu & Co (M) Sdn Bhd [1978] 2 MLJ 137 (folld)

Legislation referred to

Contracts Act 1950 ss 104, 105

J Doshi (*Abdullah & Zainudin*) for the plaintiff.

S Ravi Chandran (*Yusrin Faidz* with him) (*Anad & Noraini*) for the defendant.

Cur Adv Vult

Kamalanathan Ratnam J:

Facts

The plaintiff which runs a chain of supermarkets, entered into an agreement with the first defendant on 1 January 1987 whereby the first defendant agreed to provide armed guard services for 'the provision of collecting and delivering' of the plaintiff's valuables. For this the first defendant agreed to provide a specially designed vehicle and armed escort crew to collect from the relevant collecting point, namely, Jaya Jusco Taman Tun, Jalan Tun Mohd Fuad 3, Taman Tun Dr Ismail, Kuala Lumpur, a consignment of cash and transport the same to a delivery point being a designated bank for the said consignment of cash, to be credited to the account of the plaintiff.

On the morning of 11 May 1987, the first defendant instructed the second, third and fourth defendants and another, to carry out the transfer of cash from the Jaya Jusco Store at Taman Tun Dr Ismail, Kuala Lumpur. The second, third and fourth defendants were the guards, and the driver of the van was one Yaacob Ambik. After collecting the cash and locking it in the cash transit box, the party proceeded to the parking area at the rear of the building, where the van was parked. As they descended the steps to the rear of the building, they were confronted by three armed robbers. There was a shoot out. The robbers grabbed the money box from the fourth defendant and the pump gun from the third defendant who was shot twice. The robbers then made good their escape.

The plaintiff's case

The plaintiff contends that the first defendant was negligent, had breached the agreement dated 1 January 1987 and that as bailees for reward, the first defendant was liable for the losses suffered by the plaintiff. The plaintiff therefore claimed the sum of RM176,631.84 being the amount lost to the robbers, with interest at 8% from 11 May 1987 and costs.

Findings of the court

After the plaintiff closed its case, the defendants were not present to give evidence. Counsel requested that I stand down the matter which I did. When I resumed hearing, counsel for the defendants informed me that as he was unable to get his clients, he was unable to adduce evidence and that he would submit on the evidence so far adduced. By consent, parties requested for written submissions.

Is there negligence?

In support of its case, the plaintiff called three witnesses. PW1 was the deputy general manager of the plaintiff. He was the signatory to the agreement signed between the parties. He admitted that whilst he had signed the agreement, he had found it difficult to understand the contents, as he was a Japanese. However, he was explained the contents by four of his officers. He was told that since the first defendant was transporting the cash

for the plaintiff, the first defendant would take all responsibilities for its safe delivery. He also confirmed that the sum of RM176,631.84 was robbed. When he went to the scene of the robbery immediately on being informed, he saw the first defendant's van parked about 30–50 meters away from the rear door and on the public road. The second witness for the plaintiff was its project manager who drew a plan of the building showing the loading bay area. The third witness, PW3, was a consultant to the plaintiff but at the material time he was the general affairs manager of the plaintiff. He testified that before the said agreement was signed there was a meeting between the representatives of both parties. He was at that meeting and he was assured by one Capt Mohd Salleh, who represented the defendant, that the first defendant would provide full cover for all losses including robbery. He was assured by Capt Mohd Salleh that the plaintiff need not have any insurance to cover the cash in transit as the first defendant would compensate for any such loss. It was also agreed that the money would be collected by the first defendant's armed crew from the plaintiff's cashier's room and that the armoured vehicle would be parked at the loading bay. However, he admitted that all these were not in writing. The loading bay was chosen as it was a private access directly connected to the plaintiff's outlet whereby the money would be immediately put into the vehicle and not seen by the public. This was agreed upon as a safety precaution to avoid theft or robbery. In addition thereto, he testified that the loading bay is directly connected to the shopping complex. He also reiterated the evidence of PW1. He said that the first defendant was retained because it had agreed to transport their collections by giving full coverage and protection and also because the first defendant had agreed to indemnify and compensate the plaintiff for all losses. He also confirmed that the plaintiff would not have cancelled its cash-in-transit insurance cover if not for the assurances given by the first defendant. When he went to the scene he found that the armoured van of the first defendant was not parked at the loading bay area but that it was parked about 30 meters away.

It is trite law that the onus is always on the plaintiff to prove negligence. Unfortunately, other than merely alleging particulars of negligence, the plaintiff did not, through any of its witnesses, establish any of the particulars of negligence pleaded. In respect of the allegation against the first defendant, the plaintiff has not shown what ought to have been an adequate number of armed security guards. In this case, there were three guards. However, whilst there is evidence that the third defendant had a pump gun no evidence was led if the others were armed. The plaintiff failed to obtain further and better particulars as to whether the other guards were armed. Even if they were, no evidence was led as to what they could or ought to have done. The next allegation related to the insufficient skill and competence of the security guards. Whilst admittedly a robbery had occurred, the plaintiff has failed to adduce any evidence as in what way the said guards lacked skill or that they were incompetent. The next allegation was that they were not trained to safely manage or handle or transfer the consignment to the parked armoured van. Again, no evidence was led on this. The next was an allegation that the guards were not trained to handle,

ward off or subdue the robbers. Surely, the plaintiff does not expect the first defendant to employ karate experts or quick-on-the-draw sharp shooters. In any case, whilst there is a pathetic lack of evidence led, I must assume that there must have been some resistance from the guards because one of them was seriously shot. What more could the first defendant have done? The last allegation refers to a failure to generally provide security for the transportation of valuables under its care. This is such a bare pleading that it suggests a desperate attempt on the part of the plaintiff to scrape the barrel in search of particulars of negligence.

Turning now to the allegation of negligence as pleaded against the first defendant's servants, the first of the particulars related to the inadequate precaution taken for the security of the said cash. Again, no evidence was led other than this mere plea. The next allegation was that, by leaving the armoured vehicle too far away from the plaintiff's premises, the first defendant was negligent. The agreement defines 'the designated collecting point' as the address from which any valuables are to be taken into the custody of the first defendant, and the schedule to the agreement had stipulated, the collecting point as Jaya Jusco Taman Tun, Jalan Tun Mohd Fuad 3, Taman Tun Dr Ismail, Kuala Lumpur. There was absolutely no stipulation that the loading into the van ought to be at the loading bay. Whilst there is a letter dated 5 June 1987 from the first defendant to the plaintiff signed by the manager that the cash-in-transit vehicle would be parked at the loading/unloading point at the rear of the building and also at the front, cl 8 of the agreement stated clearly that the said agreement constituted the entire contract between the parties and that it should not incorporate or be deemed to have incorporated the provisions of any extraneous document. In any case, the said letter is signed by the manager. Clause 9 of the agreement stipulates that if there is any variation, extension, omission or cancellation of the expressed terms of the agreement, it shall only have binding force if under the hand of a director or of the secretary of the first defendant and the said clause expressly states that no other person other than the director or secretary has any authority to negotiate to enter into any commitment on behalf of the first defendant, the effect of which might involve the company in any legal liability whatsoever. In any case, there is no evidence before me that the manager who signed, was the director or secretary of the first defendant.

Even so, the agreement only talks of a 'designated collecting point' and a 'designated delivery point'. I find that where the armoured van was to be parked, is certainly an additional term. An addition does not fall within the meaning of variation, extension, omission or cancellation.

Both PW1 and PW3 testified that they saw the armoured van parked 30–50 meters from the rear door and on the public road. The plaintiff led no evidence to show how this can connote negligence.

The next allegation was, failing to 'take any proper look out'. The plaintiff did not even define what is meant by to 'take any proper look out'. The next was an allegation that the servants of the first defendant had failed to use their weapons effectively. This clearly pre-supposes an admission by the plaintiff that the guards were armed, the complaint being that they were

ineffective in the use of the weapons. As I had said earlier, unless the guards are, taking a page off the Wild West, quick on the draw gun-fighters, no one would expect the guards to be martyrs. The last allegation that the guards should have warded off or subdued the armed robbers is a call far beyond the call of duty. There is evidence that the three robbers who took the guards by surprise, were all armed. Yet, as I had said earlier, there must have been some resistance on the part of the guards as one was seriously shot. In the circumstances, it is my judgment, that the plaintiff had failed to prove negligence against the defendants.

Did the defendants breach the agreement dated 1 January 1987?

The plaintiff's case is that upon representation made by the first defendant's representatives to the plaintiff's representatives, that the first defendant would indemnify the plaintiff in respect of any loss, inclusive of loss due to robbery, the plaintiff was induced to enter into the agreement dated 1 January 1987. In respect of this issue, the plaintiff pleaded three particulars which are as follows:

(a) Failing to provide the security services which the first defendant had impliedly and/or expressly agreed to provide.

(b) Allowing the money of the plaintiff to be stolen in breach of the duty of care which the first second, third and fourth defendants owed to the plaintiff.

(c) Acting negligently and without due care which resulted in the plaintiff's property (money) being stolen by third parties.

To my mind, these are mere repetitions of the particulars of negligence already dealt with. In any case, the first defendant relies on various exemption clauses. It is relevant to reproduce them.

Clause 3(b) reads as follows:

> Subject to the provisions of cl 4 hereof indemnify the client during any period of the company's responsibility against all losses of valuables due to forgery (which for the purposes of this agreement means the forging or fraudulently altering of any document or the using of any forged or fraudulently altered document by an employee of the company whereby he or she obtains possession of valuables) or to all losses of valuables due to any employee of the company committing any offence under ss 403, 405, 408, 418, 378, 381, 415, 416 or 420 of the Penal Code of Malaya FMS Cap 45. Provided always that the client shall have given written notice of such loss to the company within seven (7) days of the discovery of such loss or the end of such period of the company's responsibility during which the loss is said to have occurred (whichever is the earlier) and in default of such notice within such period the company shall not be held responsible for such loss. Provided always that the company's maximum liability against such loss shall be Ringgit RM2m (Two Million Only) hereinafter called 'the maximum sum'; ... .

Clauses 4(a) and (b) read as follows:

> (a) The Company shall not be liable for any loss of or damage to valuables arising directly or indirectly from or in consequence of any of the

A excepted risks or to which any of the excepted risks shall have contributed;

(b) Save as to loss due to forgery or to any employee of the Company committing an offence or offences under ss 403, 405, 408, 418, 378, 381, 415, 416 or 420 of the Penal Code of Malaya FMS Cap. 45 as aforesaid up to the maximum sum the Company will not in any circumstances be B liable (either directly or vicariously) for any injury to or loss or damage sustained by the Client or its servants or agents which may result from negligence fraud or dishonesty on the part of the Company or its servants or agents whether acting within the course of their employment or not; ... .

C It is clear that even assuming such an oral promise has been made to the plaintiff as to induce the plaintiff to enter into the contract (which contention of the plaintiff I hereby reject) the plaintiff, by signing the said agreement which exculpates the first defendant from negligence, fraud or dishonesty on the part of the first defendant or even its servants or agents whether acting within the course of employment or not, unless such an D offence falls within the section of the Penal Code referred to in cl 4(b), is estopped from falling back upon the alleged inducement, if at all there was such an inducement.

Is the defendant liable as a bailee?

E Although the defendant did not admit to the sum of RM176,631.84 as the sum lost to the robbers, I find that there is sufficient evidence in the common agreed bundle of documents ('CABD') agreed to during case management, in respect of this sum. The defendant had included in the CABD an investigation report to its insurers, confirming the sum as RM176,631.84. The first defendant had signed a collection note on 11 May F 1987 confirming receipt of RM180,000.00 (see CABD 16). Further, PW1 testified to this figure and I accept this evidence.

Section 104 of the Contracts Act 1950 ('the Act') reads as follows:

Care to be taken by bailee

In all cases of bailment the bailee is bound to take as much care of the goods G bailed to him as a man of ordinary prudence would, under similar circumstances, take of his own goods of the same bulk, quality, and value as the goods bailed.

Section 105 of the Act reads as follows:

Bailee when not liable for loss, etc, of thing bailed

H The bailee, in the absence of any special contract, is not responsible for the loss, destruction, or deterioration of the thing bailed, if he has taken the amount of care of it described in s 104.

The question arises on whom does the burden of proof lie. In *Port Swettenham Authority v TW Wu & Co (M) Sdn Bhd* [1978] 2 MLJ 137, I Lord Salmon said in the Privy Council at pp 138F–139B as follows:

Their Lordships consider that the onus is upon the defendants under ss 104 and 105 to prove that they had taken as much care of the plaintiffs' goods as

a Port Authority of ordinary prudence would, under similar circumstances, have taken of its own goods of the same bulk, quality and value as the 64 lost cases. See *Lee Heng v Port Swettenham Authority* [1971] 2 MLJ 27 at p 29 and *Indian Contract and Specific Relief Acts* by Pollock and Mulla (6th Ed) at p 521 in which the learned authors, who are generally regarded as authorities of great weight, state:

> 'In cases governed by the provisions of ss 151 and 152 [which correspond exactly with ss 104 and 105 (ibid)] the loss of damage of goods, entrusted to a bailee is prima facie evidence of negligence, and the burden of proof, therefore, to disprove negligence lies on the bailee.'

Their Lordships respectfully agree with this statement of the legal position. It has, however, been argued on behalf of the defendants that neither ss 104, 105 nor 114 spell out that the onus lies upon them to prove that they took the degree of care specified in s 104 in respect of the 64 missing cases. Section 114, for example, reads:

> 'If, by the default of the bailee, the goods are not returned, delivered, or tendered at the proper time, he is responsible to the bailor for any loss ... of the goods from that time.'

If there is nothing in the sections to establish with certainty whether the onus is upon the bailor to prove the default, or upon the bailee to disprove it, these sections must be interpreted in the light of the common law. Pollock and Mulla, however, comment upon s 161 of the *Indian Contract Act* (which is in exactly the same terms as s 114) at p 531 (6th Ed) as follows:

> 'Unexplained failure to return the thing bailed is presumed to be by the bailee's default.'

For this proposition they cite an Indian authority, *Kush Kanta Barkakati v Chandra Kanta Kakati* (1923) 28 CWN; 83 IC 151 where, as they rightly say:

> '... the English authorities on which this section is founded are cited at some length.'

It is important to remember that under this issue, the onus of proof has shifted to the bailee to show that it had taken as much care of the plaintiff's goods as a person of ordinary prudence would under similar circumstances, have taken of its own goods.

The defendants however rely on 2 *Halsbury's Laws of England* (4th Ed) para 1539 (p 711) which reads:

> The bailee is not, apart from special contract, an insurer and therefore, in the absence of negligence on his part, he is not liable for the loss or damage to the chattel due to some accident, fire, the acts of third parties, or the unauthorised acts of his servants acting outside the scope of their employment. But if he entrusts the duty to take care of the chattel to a servant or agent, he is answerable for the manner in which that servant or agent carries out his duty.

The defendants argue that since the robbery was perpetrated by third parties, they could not be liable.

The answer to this line of defence rests still with the decision of the Privy Council in *Port Swettenham Authority*. Even if it is the act of the third party that caused the loss, the onus of showing that there was no negligence on its part, still rested with the first defendant. In this case the defendants

A did not give any evidence. Since they had admitted the bailor/bailee relationship it was incumbent upon them to adduce evidence of exculpation. Their failure to even attend court, must weigh heavily against the defendants. In the circumstances, it is my finding that on this issue alone the plaintiff has succeeded by default of the defendants to rebut the prima facie evidence of negligence that latched onto them, by virtue of the
B entrustment of the cash, as bailee.

I therefore enter judgment for the plaintiff in the sum of RM176,631.84 with interest at 4%pa from 11 May 1987 and costs.

Plaintiff's claim allowed.

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Reported by Chin En Tek

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